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## TITLE 327 WATER POLLUTION CONTROL BOARD

### LSA Document #08-764

#### SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST PUBLIC HEARING

The Water Pollution Control Board held a public hearing on September 14, 2011, on the draft rule, LSA Document #08-764, regarding development of new rules and amendments to rules concerning antidegradation standards and implementation procedures. The following commenters spoke at the hearing:

Andes, Fredric P., Barnes & Thornburg LLP (FPA)  
Davis, John M., Deputy Director at the Indiana Department of Natural Resources (DNR)  
Dennis, Lynn, The Nature Conservancy (TNC)  
Griffin, Vince, Indiana Chamber (IC)  
Hyman, Jeffrey, Attorney representing the Conservation Law Center, (CLC)  
Lohner, Tim, American Electric Power, including Indiana Michigan, speaking on behalf of the Indiana Utility Group (IUG)  
Maloney, Tim, Hoosier Environmental Council (HEC)  
Quinn, Bowden, Sierra Club Hoosier Chapter (SCHC)

Following is a summary of the comments received and IDEM's responses thereto:

#### Indiana Utility Group

*Comment:* The current version of the draft rule contains welcomed clarifications such as those concerning threatened and endangered species, available loading capacity, and used loading capacity. IUG accepts that a comprehensive effort to refine the rule at this stage in the administrative process would be unprecedented; however, the IUG continues to urge additional refinement of the rule as the administrative rulemaking process proceeds. IUG does not oppose preliminary adoption of the draft rule but does believe that further improvements to the draft rule must be made during the next phase of the rulemaking to achieve the appropriate legal thresholds required for implementation. (IUG)

*Response:* IDEM believes that the proposed rule, as preliminarily adopted achieves the appropriate legal thresholds required for implementation. Through the third notice of comment, IDEM will consider if clarification of the rule language is necessary prior to final adoption.

*Comment:* The draft rule as written is so vaguely stated that it could be misunderstood to apply to other Clean Water Act regulatory actions, such as 401 certifications and unpredictable storm water flows that do not limit themselves to this type of implementation process. IDEM is urged to speak to this matter preferably directly in the language of the rule by limiting it to NPDES permitting only. It stands to reason that the antidegradation program, a Clean Water act concept, should follow closely the NPDES permitting program. (IUG)

*Response:* To comply with the Clean Water Act, Indiana's antidegradation standards apply to all surface waters of the state. The antidegradation implementation procedures apply to those activities over which IDEM has regulatory authority including 401 certification and NPDES permitted stormwater discharges. IDEM believes the 401 certification requirements to avoid, minimize, and mitigate for impacts to water quality satisfy antidegradation. As noted in the rule, IDEM will have to do an antidegradation demonstration for each general permit, including those general permits issued to control storm water discharges.

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*Comment:* If IDEM and the water board believe that the applicability of the antidegradation rule needs to be broader than NPDES permitting, then the rule's applicability should separately address actions of NPDES dischargers and other actions. (IUG)

*Response:* To comply with the Clean Water Act, Indiana's antidegradation standards apply to all surface waters of the state. The antidegradation implementation procedures apply to those activities over which IDEM has regulatory authority. IDEM believes that basic elements of antidegradation implementation as laid out in the rule are workable for both NPDES discharges and other actions than impact water quality – it is not necessary to address them separately in this rule.

*Comment:* The term “regulated pollutant” continues to leave unanswered the question as to how narrative criteria will be applied. This legal uncertainty means the regulated community will remain exposed to unpredictable and unanticipated regulatory and legal actions that will make investment and operations difficult to quantify and, therefore, difficult to justify. IUG suggests that the rule provide that a regulated pollutant be a numerically expressed parameter for which water quality criteria have been adopted. IDEM has previously responded that U.S. EPA and surrounding states have included narrative criteria, and therefore, so should Indiana. IUG counters that the rule needs objective implementation, including implementation of the concept of de minimis lowering of water quality, and that can only be achieved for narrative criteria where a numeric value has been developed to represent its expression or implementation. This issue regarding narrative criteria is too important to be left unstated in the draft rule for subsequent treatment only in guidance. (IUG)

*Response:* IDEM believes it is appropriate to include narrative criteria in the definition of regulated pollutant because that there are pollutants that do not currently have a numeric water quality standard that do merit regulatory review. IDEM recognizes that narrative water quality criteria cannot be used to establish a de minimis lowering of water quality because a numeric value is necessary to develop the available loading capacity. However, in practice, for NPDES permits, the narrative criteria of Indiana's water quality standards are protected through the establishment of numeric effluent limitations. These numeric effluent limitations are based on an applied wastewater treatment technology such as an oil/water separator or a sedimentation lagoon.

*Comment:* The draft rule continues to leave the definition for toxic substances vaguely described as substances that are or may become harmful. It is unacceptable that IDEM has chosen not to define toxicity substances any more specifically because the agency says it would not have time to engage in a rulemaking effort to add a toxic substance to the regulatory list should that become necessary to manage an imminent threat to human health and the environment. (IUG)

*Response:* IDEM believes the definition of toxic substances is appropriate: ““Toxic substances” means substances that are or may become harmful to:

- (A) aquatic life;
- (B) humans;
- (C) other animals;
- (D) plants; or
- (E) food chains;

when present in sufficient concentrations or combinations. The term includes those substances identified as toxic under Section 307(a)(1) of the CWA.” This definition is consistent with the definition used in other Indiana rules.

*Comment:* The draft rule does not take into account the regional nature of the electric utility industry where power plants located in one locality may benefit those living in more distant localities. IUG has previously asked IDEM to recognize the necessity of a reasonable

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economic analysis by including the following language in the draft rule: “Where relevant, the anticipated impact on economic and social factors on a local, state and regional basis, as appropriate.” (IUG)

*Response:* The economic and social factors listed for evaluation, where relevant, in an antidegradation demonstration are those identified in statute at IC 13-18-3-2 (s). One of these factors, found in the rule at Section 5 (g) (5) (P) is: “Inclusion by the applicant of additional factors that may enhance the social or economic importance associated with the proposed discharge, such as an approval that recognizes social or economic importance and is given to the applicant by: (i) a legislative body; or (ii) other government officials.”

This would allow for the inclusion of information on regional and state level impacts.

*Comment:* IDEM acknowledged in its response to comments that “316(a) variances should not be subject to antidegradation review,” however, the draft rule still excludes such variances from waters designated as ONRWs. If 316(a) criteria are fully met, the applicable Clean Water Act protections would be achieved, which include protecting the existing uses. The statutory scheme of legislative history indicate that limitations developed under Section 316 take precedence over other requirements of the Act and should, therefore, be exempt from antidegradation review. IUG continues to urge removal of the rule reference to 316(a) as prohibited when, as a matter of Clean Water act law, such variances are not prohibited. (IUG)

*Response:* The antidegradation standard is consistent with federal regulation which only allows for temporary reductions in water quality in Outstanding National Resource Waters – see 40 CFR § 131.12(a)(3).

#### **Department of Natural Resources**

*Comment:* The Department of Natural Resources (DNR) supports the antidegradation draft rule and appreciates the efforts IDEM is making on behalf of the Indiana environment; however, DNR asks that the rule return to the original rule language concerning state threatened and endangered species. Federal and state information is housed in our data base in our Division of Nature Preserves. That information is used with the Office of Surface Mining, the U.S. Fish and Wildlife Service and other federal partners. Other laws regarding construction and financing require looking at this information on state threatened and endangered species. The very reason for having the state list is to help protect those species that rely on water so it seems that a rule about antidegradation of water should include provisions to consider state species that rely on water and are affected by its quality. (DNR)

*Response:* IDEM agrees that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species and has suggested an amendment to the definition for final adoption.

*Comment:* Protecting state-listed species prevents them from moving onto the federal list of endangered or threatened species. Once a species is on the federal list, consideration given to them under programs like antidegradation is more expansive. (DNR)

*Response:* IDEM agrees that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species.

*Comment:* The IDEM commissioner when giving consideration to all the elements involved in an antidegradation review should at least consider the state listed threatened and endangered species. (DNR)

*Response:* IDEM agrees. One of the factors required for consideration in an antidegradation demonstration is the impact on endangered or threatened species. IDEM believes that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species.

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*Comment:* The state list of threatened and endangered species is a list with a date but DNR's Commission can provide additions or deletions to the list to anyone at any time. (DNR)

*Response:* IDEM agrees that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species.

*Comment:* The idea of only referencing the state listed threatened and endangered species in a guidance document is worrisome because guidance documents can't be enforced and can be overlooked unlike rules that must be followed. (DNR)

*Response:* IDEM agrees that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species.

### **The Nature Conservancy**

*Comment:* The Nature Conservancy agrees with all that Mr. Davis from DNR said about the importance of the antidegradation rule retuning to its original language requiring consideration being given to the list of state threatened and endangered species. As just one example of how this could impact species in Indiana, let's consider the Blue River, the South Central Indiana Blue River, where The Nature Conservancy has been partnering with DNR for nearly 20 years on many projects, including the Eastern Hellbender Salamander, which is a very large salamander that is very rapidly declining in its range in Indiana. The Hellbender is a state listed threatened and endangered species but not yet federally listed. The Hellbender is rapidly declining in its entire range so, if Indiana doesn't do its part to keep these populations where they should be or improving them, then the species definitely could move to the federal endangered species list, which is a heavier burden for people to deal with. (TNC)

*Response:* IDEM agrees that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species.

### **Indiana Chamber**

*Comment:* The Chamber recognizes this is preliminary adoption, and while there have been some changes, the Chamber views the rule as a work in progress and will identify areas needing improvement in our written comments. As well, the Chamber agrees with many of the comments made by Tim Lohner on behalf of the IUG. The Chamber does not oppose preliminary adoption of the rule. (IC)

*Response:* IDEM appreciates the Chamber's support in preliminary adoption of the rule and will consider the Chamber's, along with any other comments, received on the rule during the third notice of public comment.

### **Sierra Club Hoosier Chapter**

*Comment:* The Hoosier Chapter of the Sierra Club supports preliminary adoption of the draft antidegradation rule, but there is still concern about the decision to allow an exception for mercury from the requirements for bioaccumulative chemicals of concern in the Great Lakes Basin and Outstanding National Resource Waters. The difficulty of detecting and treating mercury is acknowledged; however, the extreme toxicity and threat to reproductive health must not be ignored. Two questions arise from this problem of the rule treating mercury not as a bioaccumulative chemical of concern: (1) How will IDEM determine whether a mercury loading to a tributary will impact an OSRW in order to decide whether the loading should be reviewed under the Tier 2 or Tier 2.9 standard; and (2) will IDEM require that the proposed water quality improvement projects offered to compensate for a mercury loading to an OSRW be restricted to

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those that remove a greater amount of mercury from the watershed, or will IDEM attempt to assess the toxicity of other chemicals in comparison to mercury to allow a broader range of projects? (SCHC)

*Response:* IDEM believes it is appropriate to recognize the ubiquitous nature of mercury. Failing to recognize that fact by setting the antidegradation standard at no new or increased discharge makes the standard impossible to meet. This does not mean that the toxicity of mercury is ignored. The proposed rule does not allow for a de minimis lowering of water quality for any bioaccumulative chemical of concern (BCC), including mercury. Any lowering of water quality is a significant lowering of water quality requiring some level of an antidegradation demonstration unless it is an exempt, short-term, temporary discharge.

In answer to question (1): Mixing zones for mercury are not allowed in any Indiana waters. Any discharge of mercury into waters of the state at a concentration higher than the representative background concentration will result in a lowering of water quality in the receiving waters and a discharge of mercury that results in a lowering of water quality in a tributary to an OSRW may also result in a lowering of water quality in the OSRW if the higher concentration of mercury reaches the OSRW. In answer to question (2) According to IC 13-18-3(l)(2)(A) the water quality improvement projects must result in "Implementation of a water quality project in the watershed of the outstanding state resource water that will result in an overall improvement of the water quality of the outstanding state resource water." The term "overall improvement of the water quality of the OSRW" was not defined by the legislature. One approach is to require any water quality improvement project to offset the loading of the specific pollutant or pollutants from a proposed new or increased loading to ensure that any approved project results in a net reduction in the pollutants. An alternate approach is to require that any water quality improvement project results in an overall improvement demonstrated by other environmental benefits including restoration of wildlife habitat which may not result in much, if any, reduction in the pollutant(s) proposed for discharge to the waters. Both of these approaches will result in an overall improvement in the water quality of the OSRW, but in very different ways. IDEM will, therefore, consider all options and approaches for potential water quality improvement projects.

*Comment:* The assumption is that the questions about how IDEM will treat mercury, whether reviewed under the Tier 2 or Tier 2.9 standard and with regard to the water quality improvement project, will be answered by the guidance document that will accompany the final adoption of the antidegradation rule. A guidance document should be required at the time of final adoption to answer the many questions left unresolved by the rule, but this leaves IDEM with yet another time-consuming task before this rulemaking can be completed. The possibility of delay causes further concern as to when the antidegradation rule will be effective. (SCHC)

*Response:* IDEM is committed to a workable antidegradation rule and will evaluate the need for and timing of supplemental materials and guidance documents as the rulemaking process moves forward, while recognizing the importance of avoiding any further unnecessary delays in this rulemaking process.

*Comment:* Clarification is needed from the WPCB as to what its role will be in the adoption of the antidegradation guidance. Normally, the board reviews but does not adopt IDEM guidance documents. If the antidegradation guidance is presented with the rule for final adoption and commenters criticize aspects of the guidance at the hearing, will the board feel empowered to require changes in the guidance before adopting the rule or is that strictly in IDEM's purview? (SCHC)

*Response:* IDEM will evaluate the need for supplemental materials and guidance documents as the rulemaking process moves forward. IC 13-14-1-11.5 provides the process by which IDEM may adopt a nonrule policy that interprets, supplements, or implements a statute or



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rule. The process involves the opportunity for public comment on the proposed policy prior to presentation of the proposed policy by IDEM to the Board. However, Board approval of IDEM nonrule policy documents is not required or provided for by statute.

*Comment:* The Hoosier Club strongly objects to the limitation of the definition of endangered species to those that are federally listed. Since the antidegradation rule appropriately allows the commissioner to deny a proposed lowering of water quality if it would jeopardize a state-listed endangered species, the endangered species definition should continue to reference this list so that applicants are required to include information about potential impacts to these species in their antidegradation demonstrations. Members of the public should be able to get information about state endangered species affected by a proposed project but may not be able to find this information if it is not included in an antidegradation demonstration. The rule needs the inclusion of the DNR endangered species list in the definition of endangered and threatened species. (SCHC)

*Response:* IDEM agrees that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species and has amended the definition to include those species.

### **Conservation Law Center**

*Comment:* Page eight of the internal WPCB report (of rule changes occurring after the July 27, 2011, preliminary adoption hearing) discusses the pollution trading exemptions in section 5 of the draft rule and states that these exemptions are simply updated carryovers from the existing antidegradation rules in 327 IAC 5-2-11.3 and 327 IAC 5-2-11.7. The accuracy of this statement about being merely updated carryovers is questionable for the following reasons which are based on the fact that the current draft rule exemptions actually differ significantly from the existing rule exemptions:

- (1) the existing rule exemptions do not apply to BCCs but in the draft rule the “Does not apply to BCC” statement of the existing rule has been removed;
- (2) in existing rules, the commissioner has discretion in whether to apply the exemption to a particular case, but that discretion has been removed in the draft rule and, instead, if certain conditions are met, then the exemption is mandated to apply without giving the commissioner discretion to decide whether the exemption should apply;
- (3) a clause has been added to the draft rule taking away any consideration about the importance of an air pollutant subject to pollutant trading with a water pollutant and asking for no consideration of whether the air pollutant is already meeting federal or state standards; and
- (4) existing rules allow trading between pollutants within the same waterbody, which made scientific logic, but the draft rule has replaced “waterbody” with the expanded scope of trading within the “watershed”.

The fourth change about the draft rule allowing pollutant trading on the watershed scale conflicts with the antidegradation standard that requires a demonstration to show that a lowering of water quality accommodates important economic or social development in the area of the water that is receiving the additional pollution. The change to allow pollutant trading on the watershed scale would allow pollutant trading between one community and area versus another community and area so it is no longer a trade in the area in which the receiving water is located. This change to allow trading on the watershed scale violates the Clean Water Act policy for antidegradation. (CLC)

*Response:* IDEM does not presume to speak for the WPCB, but believes the point of the statement in the report is that the general concepts of the “pollution trading exemptions” are in the current antidegradation implementation procedures which apply to waters inside the Great

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Lakes basin. It is important to note that in the proposed rules, the pollution trading activities are no longer exempt from the antidegradation demonstration requirements, but require some level of an antidegradation demonstration including a demonstration that the activity is necessary when compared to options for no degradation, minimal degradation and degradation mitigation techniques or alternatives. IDEM believes the 10 digit watershed is an appropriate scale to evaluate pollution trading.

*Comment:* The 10-digit watershed scale for environmental improvement projects is an understandable attempt to keep environmental benefits closer to the site of the water degradation, but the 10-digit watershed is still too large in scale to keep the improvements in the area in which the receiving water is located. With a 10-digit watershed, not only do you have considerable length of stream but also different tributaries coming into the stream. There could be an increase in water quality in one tributary and a decrease in another tributary but not necessarily an improvement in the area in which the receiving water is located. (CLC)

*Response:* IDEM believes the 10 digit watershed is an appropriate scale for a demonstrating improvement in water quality due to an environmental improvement project.

### **Hoosier Environmental Council**

*Comment:* The Hoosier Environmental Council asks that the rule return to the prior definition of threatened or endangered species that included state-listed species. Without inclusion of state-listed species in the definition, the antidegradation rule creates inconsistency within the rule because the requirement is only to provide information about federal species in the antidegradation demonstration; yet, the commissioner, in his determination on the demonstration, can make a decision based on the presence of state-listed species as well as federally listed species. In order to make that determination, the commissioner will need to have information about the presence of state-listed species provided in the antidegradation demonstration. (HEC)

*Response:* IDEM agrees, the rule language should be as internally consistent as possible. IDEM believes that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species and has amended the definition to suggest inclusion at final adoption

*Comment:* When considering the impacts to aquatic life due to a project considered under antidegradation, attention needs to be given to the ten state-listed endangered or threatened fish species, none of which are on the federal list of endangered or threatened species. Under Indiana endangered species of reptiles and amphibians, only one of the 20 state-listed species is also on the federal list of endangered or threatened species. A number of those state-listed species would be affected by water quality impacts: the Hellbender, the Butler's garter snake, the cottonmouth, the spotted turtle, the river cooter, and Blanding's turtle would be some examples of state-listed species that are dependent on aquatic habitat. (HEC)

*Response:* IDEM agrees. One of the factors required for consideration in an antidegradation demonstration is the impact on endangered or threatened species. IDEM believes that the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species.

*Comment:* There is no justification for the draft rule's exemption of mercury from consideration of how BCCs are treated. There is a state rule in existence for a mercury variance process to address those concerns that have been raised about the widespread presence of mercury in our waters. (HEC)

*Response:* IDEM believes it is appropriate to recognize the ubiquitous nature of mercury. Failing to recognize that fact by setting the antidegradation standard at no new or increased discharge makes the standard impossible to meet. This does not mean that the toxicity of

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mercury is ignored. The proposed rule does not allow for a de minimis lowering of water quality for any BCC, including mercury. Any lowering of water quality is a significant lowering of water quality requiring some level of an antidegradation demonstration unless it is an exempt, short-term, temporary discharge. Additionally, Federal regulations for the Great Lakes Basin at 40 CFR 132 (Appendix E) do not prohibit new or increased discharges of BCCs.

*Comment:* More detailed information on the guidance documents that will be part of this rulemaking is needed for public and stakeholder review as soon as possible and, hopefully, before final adoption of the rule. (HEC)

*Response:* IDEM is committed to a workable antidegradation rule and will evaluate the need for and timing of supplemental materials and guidance documents as the rulemaking process moves forward, while recognizing the importance of avoiding any further unnecessary delays in this rulemaking process.

### **Fred Andes**

*Comment:* Previous versions of this rule, federal guidance, and other state's rules have generally said there needs to be a new or increased loading that results in the need for a new or increased permit limit in order to trigger the need for an antidegradation demonstration. However, this rule through the definition at 327 IAC 2-1.3-2(51), "significant lowering of water quality", will require a discharger operating well under its permit limits to go through an antidegradation review even for making a minor change that does not result in a new permit limit. It will not be easy for IDEM to determine when the operating change is just a variation in the discharge levels and when there is actually a change in the facility that occasioned a need for an antidegradation review. Basing antidegradation review on the need for a revised or new permit limit would make the process easier for IDEM to apply. (FPA)

*Response:* IDEM believes it is appropriate for the rule to address all regulated discharges that result in a significant lowering of water quality. IDEM believes the concerns raised about changes in process within an existing NPDES permit are addressed by the exemptions found in the proposed rule in Section 4(c)(2):

"A new or increased loading that results from one (1) of the following activities that does not require the submission of information beyond what is required to comply with the discharger's existing applicable permit:

(A) A change in loading of a regulated pollutant within the existing capacity and processes that are covered by an existing applicable permit, including, but not limited to, the following:

- (i) Normal operational variability, including, but not limited to, intermittent increased loadings due to wet weather conditions.
- (ii) A change in intake water pollutants not caused by the discharger.
- (iii) Increasing the production hours of the facility, for example, adding a second shift.
- (iv) Increasing the rate of production.
- (v) A change at an internal outfall that does not directly discharge to a surface water of the state.
- (vi) A change in the applicable effluent limitation guideline based on a change in production.

(B) A bypass not prohibited by 327 IAC 5-2-8(11).

(C) A new limit for a regulated pollutant for an existing permitted discharger that will not allow an increase in either the mass or concentration of the regulated



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pollutant discharged, including a new limit that is a result of one (1) of the following:

(i) New or improved:

(AA) monitoring data; or

(BB) analytical methods.

(ii) New or modified:

(AA) water quality criteria; or

(BB) effluent limitation guidelines, pretreatment standards, or control requirements for POTWs.

(D) An increased loading of a regulated pollutant at an existing outfall discharging to a water of the state due to increasing the sewered area, connection of new sewers and users, or acceptance of trucked-in wastes, such as septage and holding tank wastes, by a POTW, provided the following are true:

(i) There is no increase in the existing NPDES permit limits.

(ii) There is no increase beyond the treatment capacity of the facility.

(iii) There is no significant change expected in the characteristics of the wastewater discharged.

(iv) There is no increased loading of BCCs from nondomestic wastes.”

*Comment:* The draft rule at 327 IAC 2-1.3-4( c)(1)(A)(ii) concerning the issue of the de minimis caps says that once ten percent of the unused loading capacity in the stream is used up, every increase thereafter, no matter how small, has to go through antidegradation review. This does not occur anywhere in federal guidance or federal regulation. EPA has approved state regulations that have no such cap. They have approved regulations that allow a 90 percent cap instead of a ten percent cap. The problem with this is that it means once the first discharger has taken ten percent of the unused loading capacity every other discharger has to go through a full antidegradation review, which does not make sense. (FPA)

*Response:* Every new or increased discharge that will result in a lowering of water quality must be evaluated at the time of the request to determine if the new or increased loading will result in a significant lowering of water quality. A significant lowering of water quality will occur when the new or increased discharge will use more than 10% of the available loading capacity or when the new or increased discharge will result in an available loading capacity that is less than the benchmark loading capacity.

The circumstance described in the comment assumes that the starting available loading capacity and the benchmark loading capacity are equal, due to an existing discharger accepting a previous increase in effluent limits equal to 10% of the available loading capacity established at the time of the previous request. If the second increased loading of the same regulated pollutant is accompanied with additional wastewater flow that increases the design flow of the discharge, then the additional wastewater discharge flow will be included in the calculation of the total loading capacity. The increase in the total loading capacity and the available loading capacity are both equal to the water quality criterion times the increase in the wastewater design flow. The background loading remains the same since the upstream flow has not increased and the background concentration should be measured upstream of the discharge. In this example the increase in the discharger design flow is equal to 10 % of the flow used to establish the original total loading capacity. With an increase in the discharger design flow there will always be an increase in the total and available loading capacity. The increased discharge is limited by the benchmark loading capacity of 10% of the original available loading capacity which is equal to the individual discharge de minimis value. When an increased loading is not accompanied with an increase in the design flow and the available loading capacity is equal to the benchmark

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available loading capacity, then any increased loading, unless it is exempt, will trigger the need for some level of an antidegradation demonstration.

*Comment:* IDEM's previous response to earlier comments about the ten percent cap was to say this situation would not become of concern because when a discharger is increasing loading it is also increasing flow so the cap will not be exceeded. There are numerous scenarios to show that IDEM's response is not accurate. For example, if a manufacturer changes its feedstock by adding or increasing the use of copper but nothing else in the facility changes, the flow does not change. In another example, a discharger may add a new unit or expand a unit to increase production, but that does not necessarily mean more water is being discharged particularly with the efforts people are making now for water conservation. It's also important to recognize that in most cases intake water is from surface water that is generally discharged to the same surface water so new water is not being discharged to the receiving stream. The downstream level of water is the same in this situation; therefore, the only change is that mass of pollutants is being added to the stream which will automatically, no matter how small that amount of mass is, trigger the antidegradation review requirement. (FPA)

*Response:* IDEM recognizes that adding additional loading of a pollutant without increasing the discharge flow will result in an increase in the concentration of the pollutant in the discharge. When the concentration of the pollutant in the discharge is greater than the representative background concentration upstream of the discharge, the discharge will result in a lowering of water quality for that pollutant. When a new or increased loading of a pollutant will result in a significant lowering of water quality, the discharger will be required to submit some level of an antidegradation demonstration, unless the discharge is exempt for some other reason than de minimis.

*Comment:* If the draft rule were changed to require antidegradation review only if a new or modified permit limit is needed, then it would address a lot of antidegradation situations because it would provide a strong incentive for dischargers to perform well under their permit limits. (FPA)

*Response:* IDEM believes it is appropriate for the rule to address all regulated discharges that result in a significant lowering of water quality. Under the commenter's proposal, regulated pollutant loading increases that are greater than de minimis, but do not cause a reasonable potential to exceed water quality standards would be exempted from antidegradation review.